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Case No. 99A370

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1999

STATE OF FLORIDA, *Petitioner,*

vs.

OSVALDO ALMEIDA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. WHETHER THE FLORIDA SUPREME COURT TOTALLY MISCONSTRUED DAVIS V. UNITED STATES, 512 U.S. 452 (1994), BY IMPROPERLY HOLDING THAT EQUIVOCAL QUESTIONS BY SUSPECTS DURING INTERROGATION, AS TO WHETHER THEY UNDERSTOOD THEIR RIGHTS, MANDATE SPECIFIC CLARIFICATION PRIOR TO ANY FURTHER QUESTIONING.

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OPINION BELOW

The opinion below has been reported as Almeida v. State, 24 Fla. L. Weekly S336 (Fla. July 8, 1999) (FSC case no. 89,432). The Florida Supreme Court denied rehearing on August 30, 1999. Pursuant to Supreme Court Rule 13.4, the time for filing the petition in this cause runs 90 days from the denial of rehearing by the Florida Supreme Court.

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> No persons . . . shall be compelled in any criminal case to be a witness against himself.

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The Florida Supreme Court entered its opinion in this case on July 8, 1999, finding Almeida's confession improperly admitted. Based upon other admissible evidence on which the jury could have relied to find Almeida guilty of this murder, the court found the admission of Almeida's confession to this murder harmless beyond a reasonable doubt[1]. The court denied Petitioner's motion for rehearing in this case on August 30, 1999. Petitioner is now seeking certiorari review in this Court.

STATEMENT OF THE FACTS

Respondent, Osvaldo Almeida, committed three murders within a six-week period in Broward County, Florida. On October 7, 1993, he picked up his first victim, Marilyn Leath, a prostitute, in Fort Lauderdale and drove around the neighborhood. After declining her services, he ordered her out of the car. As she walked away, he reached under his seat and retrieved a .44 caliber handgun with hollow point bullets. He called her back to the car, and as she approached, he shot her in the abdomen, causing her death.

On October 13, 1993, Almeida picked up his second victim, Chiquita Counts, also a prostitute, in Fort Lauderdale and drove around the neighborhood. When he later dropped her off, she asked him for additional money. He refused, and she began to curse at him and make disparaging remarks. After she got out of the car, Almeida pulled out the same .44 caliber handgun, and called her

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[1] Review is nevertheless warranted in this case where the Florida Supreme Court's misinterpretation and misapplication of Davis will preclude the State of Florida from relying on an otherwise relevant and admissible confession when Almeida later seeks to attack his judgment of conviction in a motion for postconviction relief or upon habeas corpus review.

back to the car. When she approached, he shot her in the abdomen, killing her, and then drove off.[2]

On November 15, 1993, Almeida was in Higgy's Restaurant in Sunrise with his friends when the bar owner, the third victim, Frank Ingargiola, confronted Almeida about drinking beer since Almeida was under age.[3] Almeida and Mr. Ingargiola exchanged heated words, and Mr. Ingargiola asked Almeida to leave the restaurant. Almeida left with several of his friends and, during the next several hours, Almeida repeatedly told his friends that he was going to kill Ingargiola. After Almeida had taken all of his friends home, he went back to Higgy's Restaurant and waited in his car for Ingargiola to emerge from the building. Around 4:30 a.m., Ingargiola walked outside, and Almeida shot and killed him with the .44 caliber handgun he had used to kill Marilyn Leath and Chiquita Counts.[4]

On November 29, 1993, Sunrise police officers picked up Almeida in relation to the Ingargiola murder and took him to the station for questioning. Almeida confessed to all three murders, both off-tape and on-tape. Prior to trial, Almeida's attorneys on all three cases moved to suppress all three confessions to the police. They alleged that, during the taped interrogation of Almeida regarding the Ingargiola murder, Almeida made an equivocal request for counsel that the police should have clarified, but did not, prior to further questioning.

At the hearing on the collective motions, Detective Mink of the Sunrise Police Department testified that he and Detective Allard began interviewing Almeida at the police station at 5:16 p.m. (T

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[2] By separate petition, the State of Florida is seeking this Court's review in that case.

[3] Almeida was 20 years old at the time, and the legal age for drinking in Florida was 21 years of age.

[4] This murder is the subject of this petition.

127-28). **After providing Almeida a copy of a rights waiver form, Detective Mink read each individual right to Almeida and asked him if he understood them. Almeida responded that he did and initialed each right as it was read. After the detective read the entire form, Almeida agreed to speak to them without an attorney and signed the waiver section of the form.** (T 128-36).

Thereafter, Detective Mink questioned Almeida about the murder of Frank Ingargiola at Higgy's Restaurant. After initially denying any involvement, Almeida confessed that he killed Mr. Ingargiola. (T 136-37). At 5:30 p.m., Detective Mink turned on a tape recorder to memorialize Almeida's confession. (T 137). At the beginning of the tape, the following colloquy occurred:

> Q [By Detective Mink] All right. Prior to us going on this tape here, I read your Miranda rights to you, that is the form that I have here in front of you, is that correct? Did you understand all of these rights that I read to you?
>
> A [By Almeida] Yes.
>
> Q Do you wish to speak to me now without an attorney present?
>
> A **Well, what good is an attorney going to do?**
>
> Q Okay, well you already spoke to me and you want to speak to me again on tape?
>
> Q (By Detective Alllard [sic]) We are, we are just going to talk to you as we talked to you before, that is all.

A Oh, sure.

(ST 5-6) (emphasis added).

When the tape ended at 5:51 p.m., Detective Mink called Fort Lauderdale Detectives Abrams and Walker into the room, so that they could question Almeida about the murders of Marilyn Leath and Chiquita Counts. (T 144-45). As Detectives Abrams and Walker entered, Detective Mink told them that he had informed Almeida of his rights and showed them the waiver form. (T 225, 253). Detective Abrams confirmed with Almeida that he had, in fact, been read his rights: "When Detective Mink was in there, like I said, the rights were gone over, that [Almeida] had already been read his rights, and I confirmed that with him. I did ask him that." (T 225).

Thereafter, Detective Abrams asked Almeida if he knew anything about the murder. Almeida confessed his involvement in the Leath murder and agreed to repeat his confession on tape. (T 227-29). During the taped confession, which began at 6:08 p.m., the following discussion occurred:

> Q [By Detective Abrams]. I told you when I came in here a couple of minutes ago that I'm a Fort Lauderdale detective and I'm investigating a murder that happened in Fort Lauderdale, is that right? I need a response.
>
> A [By Almeida]. Okay.
>
> Q And you agreed to talk to me, is that correct?
>
> A Yes.

Q And before talking to me, you talked to the Sunrise detectives?

A Yes

Q Detective Mink and Detective Mike [sic], right?

A Yes.

Q They gave you your rights, is that correct?

A Yes.

Q You read a form, they read it to you. Did you sign the bottom of the form?

A Yes.

Q Did you understand your rights?

A Yeah, I understand.

Q Do you have any questions about them at all?

A No.

(T 233-34).

Almeida's taped confession regarding the Leath murder ended at 6:26 p.m., and Abrams and Walker left the room. (T 253-54). At 7:00 p.m., Detective Abrams returned with Detective Palazzo to question Almeida about the Counts murder. (T 255). Almeida initially denied involvement, but ultimately confessed off-

tape to killing her. (T 256-58).[5] The detectives further clarified Almeida's understanding of his rights:

> Q. (By Sgt. Palazzo) When Detective Abrams [sic] read you your rights earlier, did you understand everything that he told you?
>
> A. Yes.
>
> Q. (By Sgt. Palazzo) You understood that you could have a lawyer if you wanted one?
>
> A. Yes.
>
> Q. (By Sgt. Palazzo) And that you don't have to talk to us if you don't want to?
>
> A. Yes.
>
> Q. (By Sgt. Palazzo) And then it's been explained to you by myself and Detective Abrams that everything that you say tonight is going to be repeated in court?
>
> A. Yes.

---

[5] The taped confession to this murder began at 7:24 p.m. (T 258-59). Almeida explained that he was initially hesitant to confess because he was ashamed of what he had done and was scared and confused. (T 265-66). Upon clarification by the detectives, Almeida indicated that he was not confused about what was happening during the interview and was not afraid of the detectives. Rather, he was scared and confused about his future. (T 266-67).

Q. (By Detective Abrams) You're not confused about any of that?

A. No.

(T 267) (Emphasis added). Almeida's taped confession regarding the Counts murder ended at 7:50 p.m. (T 290).

Almeida's attorneys collectively argued that Almeida's statement, "Well, what good is an attorney going to do" was an equivocal request for counsel, which Detectives Mink and Allard should have clarified more thoroughly prior to continued questioning. Because the officers did not, Almeida's waiver of Miranda rights, under Florida law, was not "knowing, intelligent, or voluntary," thereby rendering his confession inadmissible. While they acknowledged that Davis v. United States, 512 U.S. 452 (1994), required a "clear and unequivocal request for counsel before questioning must cease," they argued that at that time, no Florida appellate court had adopted Davis' holding. Therefore, they asserted that, under then-existing Florida law, Almeida's "equivocal request" for counsel required clarification. (R 2321-26; T 340-44, 360-63).

The trial court found Almeida "was in custody when interrogation began, thus triggering his Miranda rights," and that Almeida had fully waived his rights in writing prior to making the statement, "Well, what good is an attorney going to do." The Court concluded that Almeida's statement was "no more than a rhetorical question at best," and, as such, "it did not require a response from law enforcement." (R 2357-58).

The State prosecuted Almeida first for the Leath murder. At his trial, the State introduced, over Almeida's objection, his taped confession to the murder of Marilyn Leath. (Leath ROA 1187-88, 1207-28). Upon his conviction for first-degree murder and sentence of life imprisonment, Almeida appealed his conviction to the District

Court of Appeal for the Fourth District of Florida.[6] Almeida v. State, 687 So.2d 37 (Fla. 4th DCA 1997), State v. Almeida, 700 So. 2d 640 (Fla. 1997), cert. denied 118 S. Ct. 2326 (1998).[7]

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[6] Among other issues, Almeida challenged the trial court's admission of his taped confession. He contended, as he had in the trial court, that Almeida's statement, "Well, what good is an attorney going to do" was an equivocal invocation of counsel and that, under Florida law, the police should have clarified the statement before continuing the interrogation. Citing principally to Long v. State, 517 So.2d 664, 666-67 (Fla. 1987), cert. denied, 486 U.S. 1017 (1988), he noted that the Florida Supreme Court had therein interpreted Edwards v. Arizona, 451 U.S. 477 (1981), as requiring clarification when a suspect made an equivocal request for counsel.

[7] See State v. Owen, 696 So. 2d 715, 716 (Fla. 1997). In addressing the identical question raised here, the Florida Supreme Court in Owen observed, "At the onset, we recognize that *Davis* involved an ambiguous request for counsel whereas Owen's case turns on his purported decision to terminate interrogation. However, the reasoning of *Davis* applies when a defendant makes an equivocal assertion of any right under *Miranda*. . . . We agree that *Davis* applies as much to requests to terminate interrogation as it does to requests for counsel. *Davis* now makes it clear that, contrary to our belief at the time, federal law did not require us to rule Owen's confession inadmissible." 696 So. 2d at 717-718. The Court further held that the prior decisions relied upon by the court were "undercut" by the Davis decision, and that the state constitution would not be interpreted differently than Davis: "To require the police to clarify whether an equivocal statement is an assertion of one's *Miranda* rights places too great an impediment upon society's interest in thwarting crime. . . . Thus, we hold that police in Florida need not ask clarifying questions if a defendant who has received proper *Miranda* warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her *Miranda* rights. . . . Our decision today is in harmony with those states which have also held in the wake of *Davis* that police are no longer required to clarify equivocal requests for the rights

Meanwhile, Almeida was also convicted of the first-degree murders of Chiquita Counts and Frank Ingargiola. The trial court imposed a death sentence in each case, and Almeida appealed to the Florida Supreme Court.[8] During the pendency of all three cases, the Court issued State v. Owen, 696 S0. 2d 715 (Fla. 1997) (hereinafter, Owen II) adopting Davis.

The State relied upon Owen II and Davis to support its argument that Almeida's confessions as to both murders (Counts and Ingargiola) were admissible.[9] Relying upon Davis and Owen II, the Florida Supreme Court found Almeida's confessions in the Counts and Ingargiola cases improperly admitted. It found that Almeida's statement, "Well, what good is an attorney going to do" was "an unequivocal question that was prefatory to -- and possibly determinative of -- the invoking of a right and which cast doubt on the knowing and intelligent nature of the prior waiver."[10] Almeida

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accorded by *Miranda.*" 696 So. 2d at 718-720.

[8] Under Florida law, all cases in which a trial court imposes a death sentence are automatically appealed to the state supreme court, as opposed to an intermediate appellate court. Fla. Stat. § 921.141(4) (1997).

[9] Alternatively, the State argued that Almeida's statement was not made during the giving or waiving of Miranda rights, since Almeida had already waived his rights both orally and in writing, and had confessed off-tape to the Ingargiola murder. The police were merely memorializing on-tape Almeida's previous waiver of his rights before obtaining a taped version of the prior oral confession. Additionally, the State argued that the Florida Supreme Court had already applied Davis retroactively to Owen's case, and had applied Owen II retroactively to Almeida's Leath case; thus, it could likewise apply Owen II and Davis retroactively to Almeida's Counts and Ingargiola cases.

[10] Similar, if not identical language may be found in a pre-Davis case, State v. Craig, 237 So. 2d 737, 739-40 (Fla. 1970),

v. State, 737 So.2d 520, 524 (Fla. 1999) (emphasis in original); Almeida v. State, 24 Fla. L. Weekly S336, 338 (Fla. July 8, 1999) (same). Thus, it held that "if, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give a simple and straightforward answer." Id. Since the police did not adequately clarify Almeida's question, it found his confessions in both cases inadmissible. In the Counts case, it reversed his conviction for a new trial because it could not find beyond a reasonable doubt that the improper admission of the confession was harmless. 737 So.2d at 526. In the Ingargiola case, however, it found the improper admission of the confession harmless, and thus did not reverse his conviction. 24 Fla. L. Weekly at 338. Interestingly, in the Leath murder case, the Florida Supreme Court upheld the same admissions of Almeida's confessions based upon the adoption of Davis in Owen II. Almeida, 700 S0 2d. At 640.[11]

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wherein the Florida Supreme Court had implied, if not so specifically held, that an ambiguous request for a lawyer would not require police to clarify the suspect's wishes: "Well, I would like to have one [lawyer] in a way, but I don't see how it can help me, "was an equivocal statement not requiring further clarification.

[11] The certified question by the Fourth in Owen, was: "Do the principles announced by the United States Supreme Court in Davis apply to the admissibility of confessions in Florida, in light of Traylor? Almeida, 687 So. 2d at 37.

REASONS FOR GRANTING THE WRIT

QUESTION I

THE FLORIDA SUPREME COURT TOTALLY MISCONSTRUED DAVIS V. UNITED STATES, 512 U.S. 452 (1994), BY IMPROPERLY HOLDING THAT EQUIVOCAL QUESTIONS BY SUSPECTS DURING INTERROGATION, AS TO WHETHER THEY UNDERSTOOD THEIR RIGHTS, MANDATE SPECIFIC CLARIFICATION PRIOR TO ANY FURTHER QUESTIONING.

Under principles of federalism, states may adopt more rigorous restraints on government intrusion than those imposed by the federal constitution. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Oregon v. Hass, 420 U.S. 714 (1975); Cooper v. California, 386 U.S. 58 (1967). What states may not do, however, is impose greater restrictions on the government as a matter of federal constitutional law when this Court specifically refrains from imposing them. Hass, 420 U.S. at 719. Almeida's case presents such an imposition.[12] See Florida v. Haliburton, 475 U.S. 1078

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[12] The Florida Supreme Court adopted Davis, as controlling authority, in State v. Owen, 696 So. 2d 715 (Fla. 1997): "To require the police to clarify whether an equivocal statement is an assertion of one's *Miranda* rights places too great an impediment upon society's interest in thwarting crime. Thus, we hold that police in Florida need not ask clarifying questions if a defendant who has received proper *Miranda* warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her *Miranda* rights." 696 So. 2d at 718-720.

The Court's interpretation of federal law *sub judice*, prevents the State of Florida from using otherwise relevant and admissible evidence in this case, by casting a clearly "equivocal statement" as "precursor language to an unequivocal question as to one's

(1986) (accepting jurisdiction where state court misapplied federal constitutional law in a fifth amendment context).

The constitutional principle at issue is whether police officers must clarify questions, such as the one in this case, "Well, what good is an attorney going to do," posed by suspects during custodial interrogation. In Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that police officers must immediately cease questioning when a suspect clearly and unequivocally asserts his right to have counsel present during custodial interrogation. In Davis v. United States, 512 U.S. 452, 461-62 (1994), the Court clarified and specifically reconfirmed Edwards: "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him."

While the Florida Supreme Court had previously adopted the federal standard set forth in Edwards, it interpreted Edwards to require the cessation of questioning, except for the sole purpose of clarification, if a suspect equivocally invokes the right to counsel. Long v. State, 517 So.2d 664 (Fla. 1987). In Owen v. State, 560 So.2d 207 (Fla. 1990) (Owen I), the Florida Supreme Court applied Long in a Fifth Amendment context to reverse Owen's conviction where Owen stated twice during substantive questioning, "I don't

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constitutional right." The Court concluded that Almeida's statement, "Well, what good is an attorney going to do, "was an *un*equivocal question that was prefatory to--and possibly determinative of--the invoking of a right and which casts doubt on the knowing and intelligent nature of the prior waiver." The record reflects, however, that two years earlier this very court in the very same case in another murder, where the death penalty was not imposed, decided this very same issue as an "unquestionable equivocal statement" requiring no further clarification. Nothing in those two years changed the circumstances of these cases, neither the law nor any material fact. It is fair to say that it was an outcome oriented court that skewed the court's vision of what the words "Well what good is an attorney going to do" meant in the later two Almeida "capital" murder cases before the court.

want to talk about it."[13] The Florida Supreme Court, faced with the option of applying Davis in a Fifth Amendment context or imposing broader restrictions on the government by requiring clarification of an equivocal request to remain silent, acknowledged its prior misapplication of Edwards.[14]

While the state supreme court also acknowledged its authority to reaffirm its prior interpretation of Edwards under state constitutional law, it rejected that option and instead adopted Davis' rationale as the law in Florida:

> To require the police to clarify whether an equivocal statement is an assertion of one's Miranda rights places too great an impediment

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[13] During the pendency of Owen's retrial, Davis issued, clarifying Edwards. The trial court, however, bound by the Florida Supreme Court's opinion in Owen I, ruled Owen's confession inadmissible.

The Fourth District Court of Appeal acknowledged that it, too, was bound by the Owen I opinion on appeal, but certified a question of great public importance to the Florida Supreme Court, namely, whether Davis applies in Florida. State v. Owen, 654 So.2d 200 (Fla. 4th DCA 1995).

[14] Davis now makes it clear that, contrary to our belief at the time, federal law did not require us to rule Owen's confession inadmissible.... Moreover, there is no question that our holdings in Owen and our prior cases on the same subject were predicated upon our understanding of federal law that even an equivocal invocation of Miranda rights required the police to either terminate the interrogation or clarify the suspect's wishes. . . . Thus, Davis has undercut the premise upon which our decision in Owen was based.

State v. Owen, 696 So.2d 715, 718-19 (Fla.) (footnote omitted) (Owen II), cert. denied, 118 S.Ct. 574 (1997).

> upon society's interest in thwarting crime. . . . "We adhere to the principle that the state's authority to obtain freely given confessions is not an evil, but an unqualified good." Thus, we hold that police in Florida need not ask clarifying questions if a defendant who has received proper Miranda warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her Miranda rights.

Owen, 696 So.2d at 719 (quoting Traylor v. State, 596 So.2d 957, 965 (Fla. 1992)). Thus, Owen II was decided solely on federal constitutional grounds.

Based on this backdrop of total reliance on Davis, the Florida courts have since enforced the premise espoused in Davis, i.e., that police need not ask clarifying questions of a defendant if he makes ambiguous statements regarding his rights--until Almeida.[15]

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[15] Since 1997, when the Florida Supreme Court adopted Davis in Owen II, that court has re-affirmed Davis and Owen several times, including in one of Almeida's unrelated cases based on the same comment, "Well, what good is an attorney going to do." State v. Almeida, 700 So.2d 640 (Fla. 1997). See also Walker v. State, 707 So.2d 300, 310 (Fla. 1997) (relying on Davis and Owen to reject defendant's contention that police should have ceased their interrogation of him when he stated, on two occasions, that if police brought in stenographer to record his statement he wanted an attorney); State v. Weber, 701 So.2d 557 (Fla. 1997) (quashing the decision below wherein defendant's confession was ruled inadmissible because police failed to adequately clarify defendant's questions about his right to an attorney); State v. Skyles, 698 So.2d 816 (Fla. 1997) (quashing the decision below wherein defendant's confession was ruled inadmissible because police failed to adequately

Almeida was arrested for the murder of Frank Ingargiola, and was a suspect in the murders of Marilyn Leath and Chiquita Counts. At the hearing on Almeida's consolidated motions to suppress his confessions to all three murders, Fort Lauderdale Detective Randy Mink testified that, when they arrested Almeida and took him to the police station for questioning, he and Detective Allard immediately provided Almeida a copy of a rights waiver form. At 5:16 p.m., on November 29, 1993, Detective Mink began reading each individual right to Almeida and, after each, asked Almeida if he understood that right. Almeida responded affirmatively to each question by writing "yes" and initialing the form next to the right as it was read. After the detective read, and Almeida answered and initialed, each of the rights on the form, Detective Mink read the following question from the form: "Understanding your rights as I explained them to you, are you willing to answer my questions without an attorney present?" Almeida wrote "yes" on the form, initialed his response, and signed his name under the waiver provision.[16] (T 128-36).

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clarify defendant's statements, "I'm through man, that's all I'm saying," and "That's all I have to say is (sic) 'cause that's all I know.").

[16] The waiver portion of the form read as follows:

> I, Osvaldo S. Almeida, have read this statement of my rights or have had them read to me, and I understand what my rights are. I am willing to make a statement and answer questions. I do not wish an attorney at this time. No threats or promises have been made to me, no fear of any kind has been used against me, nor have I been tricked or fooled into giving this statement. I understand and know what I am

Thereafter, Detective Mink questioned Almeida about the murder of Frank Ingargiola at Higgy's Restaurant. After initially denying any involvement, Almeida confessed that he killed Mr. Ingargiola. (T 136-37). At 5:30 p.m., Detective Mink turned on a tape recorder to memorialize Almeida's confession. (T 137). At the beginning of the tape, the following colloquy occurred:

> Q [By Detective Mink] All right. Prior to us going on this tape here, I read your Miranda rights to you, that is the form that I have here in front of you, is that correct? Did you understand all of these rights that I read to you?
>
> A [By Almeida] Yes.
>
> Q Do you wish to speak to me now without an attorney present?
>
> A Well, what good is an attorney going to do?
>
> Q Okay, well you already spoke to me and you want to speak to me again on tape?
>
> Q (By Detective Alllard [sic]) We are, we are just

> doing. I further understand that this statement may be used against me in a court of law. I have not previously requested any law enforcement officer to allow me to speak to an attorney.

going to talk to you as we talked to you before, that is all.

A Oh, sure.

(ST 5-6) (emphasis added).[17] The trial court found the statement to be a rhetorical question that did not warrant clarification. (R 2357-58).

On appeal from Almeida's conviction and sentence of death for the murder of Frank Ingargiola, the Florida Supreme Court relied on its decision in Almeida's Counts case to suppress Almeida's confession. 24 Fla. L. Weekly at 338. In the Almeida's Counts case, the supreme court distinguished Owen II and Davis to suppress Almeida's confession, finding that the police should have clarified Almeida's statement, "Well, what good is an attorney going to do." It did so by misinterpreting Davis on two counts unsupported by fact and law. The court first questioned the grammatical context of the statement, i.e., a question versus a statement; and second, noted the timing of Almeida's statement, i.e., during the waiver process versus during substantive questioning. Neither are valid under Davis and its precursors, and both act to impose a greater restriction on the government which this Court specifically rejected in Davis.

In Davis, the suspect made an ambiguous or equivocal statement about his right to counsel. Thus, the police were not required to cease questioning or clarify the statement. In Almeida, however, the defendant made what the Florida Supreme Court characterized as "'an unequivocal question that was prefatory to--and

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[17] At the suppression hearing, Detective Mink testified that he interpreted Almeida's remark as "[a] comment, not a question. Just a comment," which he did not believe he needed to clarify. (T 143). Detective Allard testified that he interpreted Almeida's remark similarly: "I basically took it as like he was commenting on the fact . . . just like a negative comment towards having an attorney or something like that. I took that as a negative comment." (T 177). He did not interpret it as a request for counsel. (T 177).

possibly determinative of--the invoking of a right and which cast doubt on the knowing and intelligent nature of the prior waiver.'" 24 Fla. L. Weekly at 338 (quoting Almeida, 737 So.2d at 524) (emphasis added). Thus, the court concluded that the police "must stop the interview and make a good-faith effort to give a simple and straightforward answer." Id. This Court recognized in Davis the danger of this approach:

> ...The Edwards rule--questioning must cease if the suspect asks for a lawyer--provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether a suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. **We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.**

Davis, 512 U.S. at 461 (emphasis in original)(Emphasis added). See also United States v. Ogbuehi, 18 F.3d 807, 813 (9th Cir. 1994) (finding suspect's questions, "Do I need a lawyer?" and "Do you think I need a lawyer?" during reading of Miranda warnings requests for advice, not requests for an attorney).

The Florida Supreme Court's characterization that Almeida was "'asking the officer for fundamental information concerning his right to counsel'" is not supported by the factual record. Almeida, 24 Fla. L. Weekly at 338 (quoting Almeida, 737 So.2d at 524). Therefore, to impose an obligation on the police to answer such a question would absolutely defeat the premise of Davis. As so aptly explained by the Fifth Circuit Court of Appeals in a pre-Davis case,

> the limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument between interrogators and suspect about whether having counsel would be in the suspect's best interests or not. Nor may it incorporate a presumption by the interrogator to tell the suspect what counsel's advice to him would be if he were present. Such measures are foreign to the purpose of clarification, which is not to persuade but to discern.
>
> * * * *
>
> The point is that counsel's advice about what is best for the suspect to do is for counsel, not the interrogator, to give. And it is for him to give after consultation with his client and after weighing where the suspect's best interests lie from the point of view of the suspect, not from that of a policeman be he ever so well intentioned. Until this occurs, it is simply impossible to predict what counsel's advice would be; and even if it were, the right to

> advice of counsel surely is the right to advice from counsel, not from the interrogator.

Thompson v. Wainwright, 601 F.2d 768, 772 (5th Cir. 1979).

The distinction created in Almeida explicitly creates the perilous situation rejected by Davis, and its progeny. Under Almeida, Florida officers, under the federal constitution, must first discern whether the comment such as, "Well, what good is an attorney going to do," is a question or a statement and then, if the former, determine whether the question is equivocal or unequivocal, since the police need only clarify an unequivocal question. If "they" ultimately determine that the question is unequivocal, they must then "'make a good-faith effort to give a simple and straightforward answer.'" 24 Fla. L. Weekly at 338 (quoting Almeida, 737 So.2d at 525).[18] As opined in Thompson v. Wainwright, police officers in Florida must now enter that twilight zone of mutually exclusive roles, interrogator and advisor, rejected in Davis:

> We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who--because of fear, intimidation, lack of linguistic skills, or a variety of other reasons--will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject

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[18] The Florida Supreme Court provided no guidance, however, to an officer faced with "[c]ustodial utterances [that] are extraordinarily rich in diversity." Id. Moving away from clearly delineated guidelines as set forth in Davis opens the proverbial can of worms for those officers attempting to comply with suspects' rights, yet trying to obtain valid confessions from those suspects.

> to custodial interrogation is the Miranda warnings themselves.

512 U.S. at 460.

Interestingly, in Almeida's Counts case, the Florida Supreme Court did not renounce its adoption of Davis or recede from its analysis in Owen II. In fact, it attempted to reaffirm its adoption of Davis.[19] The Court noted that "[t]he impetus underlying [its] decision [to adopt Davis] was that the 'equivocal request' standard . . . had proven unworkable -- it placed 'too great an impediment upon society's interest in thwarting crime.'" Id. at 523 (quoting Owen II, 696 So.2d at 719).

The second distinction created by the Florida Supreme Court involves the timing of the equivocal comment. Although embracing Davis as the law in Florida, and conceding that an "equivocal request" standard was unworkable, the Court carved out a major exception to the Davis rule. In Davis, the suspect had formally waived his rights and thereafter made equivocal statements during interrogation. In Almeida's case, despite the fact that Almeida had formally waived his rights in writing and had confessed to the Ingargiola murder during subsequent interrogation, **the Florida Supreme Court determined that Almeida asked an unequivocal question during the giving of Miranda warnings that required clarification before questioning could continue**: "'The type of utterance at issue here . . . was an unequivocal question that was prefatory to -- and possibly determinative of -- the invoking of a right and which cast doubt on the knowing and intelligent nature of the

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[19] Our holding today works hand-in-hand with our decision in Owen in defining a few basic rules governing custodial utterances. We held in Owen that police must honor a clear statement invoking a suspects rights. We hold today that police similarly must answer a clear question concerning a suspect's rights. These twin rulings establish an unmistakable bright line for law enforcement.

Almeida, 737 So.2d at 525-26.

prior waiver.'" Almeida, 24 Fla. L. Weekly at 338 (quoting Almeida, 737 So.2d at 524) (emphasis in original).

This distinction, however, is one without a difference.[20] This Court made clear in Davis that, "if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." 512 U.S. at 458. This obviously means that a suspect must clearly and unambiguously invoke his right to counsel or to remain silent, regardless of when he chooses to do so.

To impose an obligation upon the police to cease questioning if a suspect makes an equivocal statement (or question) during the waiver process would defeat the ruling in Davis, as would an obligation to ask clarifying questions during the waiver process: "[W]e decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or

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[20] Moreover, it is unsupported by the facts of this case. As noted earlier, Almeida had read and signed a written waiver of his rights prior to any questioning. Following the waiver, Detective Mink began substantive questioning by asking Almeida about his involvement in the Ingargiola murder. Although Almeida initially denied any involvement, he ultimately confessed to the murder. In order to memorialize Almeida's confession, Detective Mink turned on a tape recorder and, as a prelude, confirmed with Almeida that he understood the rights that he had waived previously. When he sought to confirm that Almeida would continue to speak to them on-tape, Almeida made what Detectives Mink and Allard characterized as a rhetorical question. While Almeida asked the question during a prefatory attempt to confirm that Almeida understood his rights, had previously waived them, and would agree to speak to them on-tape, Almeida did not ask the question during the formal giving or waiving of Miranda rights as the Florida Supreme Court found. As in Davis and Owen II, Almeida had already waived his rights and confessed during substantive questioning. Thus, this factual distinction regarding the timing of the statement is simply unsupported by the record.

unequivocal request for counsel, the officers have no obligation to stop questioning him." Davis, 512 U.S. at 461-62. See also Ledbetter v. Edwards, 35 F.3d 1062, 1069 (6th Cir. 1994)(finding suspect's statement, "It would be nice" to have an attorney present, made during third advisement of rights just prior to taped statement, too ambiguous to require cessation of questioning); United States v. Ogbuehi, 18 F.3d 807, 813 (9th Cir. 1994) (finding suspect's questions, "Do I need a lawyer?" and "Do you think I need a lawyer?" during reading of Miranda warnings requests for advice, not requests for an attorney); United States v. Uribe-Galindo, 990 F.2d 522, 526 (10th Cir. 1993) (finding suspect's question during reading of Miranda warnings, "if at some time he wanted an attorney, could he stop answering questions," an equivocal request for counsel that did not require cessation of questioning); Smith v. State, 231 Ga.App. 677, 681, 499 S.E.2d 663, 668 (1998) (finding suspect's statement during reading of Miranda warnings, "[S]o if I want an attorney right now, what do I do?" an equivocal request for counsel); State v. Washburne, 574 N.W.2d 261, 267 (Iowa 1997) ("Merely asking whether counsel is needed is not sufficient to invoke the right to counsel and the protections provided by such an invocation."); State v. Ninci, 262 Kan. 21, 43, 936 P.2d 1364, 1381 (Kan. 1997) (finding suspect's statement during reading of Miranda rights, "[D]o I need to have a lawyer right now?" an equivocal request for counsel); State v. Thomas, 711 So.2d 808, 812-13 (La. Ct. App. 1998) (finding suspect's question during reading of Miranda warnings, "Do I need a lawyer," an equivocal request for counsel that did not require cessation of questioning); State v. Bucklew, 973 S.W.2d 83, 90 (Mo. 1998) (finding suspect's question during taped interview, "Well do you think I should have an attorney present?" an equivocal request for counsel that did not require cessation of questioning); State v. Castillo-Sanchez, 984 P.2d 787, 790-92 (N.M. Ct. App. 1999) (finding suspect's question at beginning of taped interview after formal waiver of rights, "Who can help me?" an equivocal request for counsel that did not require cessation of questioning); People v. Wright, 172 Misc.2d 674, 676, 657 N.Y.S.2d 308, 310 (N.Y. App. Ct. 1997) (finding suspect's statement during reading of Miranda warnings, "Do I need a lawyer?" an equivocal request for counsel); State v. Davis, 124

N.C.App. 93, 99, 476 S.E.2d 453, 457 (1996) (finding suspect's question to detective whether detective thought suspect needed a lawyer to be an equivocal request for counsel); State v. Kennedy, 325 S.C. 295, 309, 479 S.E.2d 838, 845 (S.C. Ct. App. 1996) (finding suspect's question, "What if I ask for an attorney?" an equivocal request for counsel).

Although the Florida Supreme Court appeared to fashion its most recent holdings in the two Almeida, cases (Counts and Ingargiola) on independent state ground, i.e., the state constitution, the Court at no point renounced its earlier acceptance of Davis, or receded from its federal law analysis in Owen II, or for that matter the (Leath) Almeida murder, as the law in Florida. "Our holding today works hand-in-hand with our decision in Owen (II) in defining a few basic rules governing custodial utterances. We held in Owen (II) that police must honor a clear statement invoking a suspects rights. We hold today that police similarly must answer a clear question concerning a suspect's rights. These twin rulings establish an unmistakable bright line for law enforcement." Almeida, 737 So. 2d at 525-26. "[T]he impetus underlying [its] decision [to adopt Davis] was the 'equivocal request' standard...[which] had proven unworkable--[because] it placed 'too great an impediment upon society's interest in thwarting crime.'" Id. At 523 (quoting Owen II, 696 So. 2d at 719).

By this case, the Florida Supreme Court has mutated Miranda and Davis to create a subclass of responses by suspects--unequivocal questions--that will only frustrate "the real world of investigation and interrogation [and] unduly hamper[] the gathering of information." Davis, 512 U.S. at 461. Such a rule would force police officers to make difficult judgment calls about "whether the utterance was a bona fide question which--under normal circumstances--would call for an answer," Almeida, 737 So.2d at 524, and what "a simple and straightforward," yet "open and forthright" answer would be, id. Because such judgment calls "would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity," Michigan v. Mosley, 423 U.S. 96, 102 (1975), this Court declined to impose

them in Davis. Where, as here, the Florida Supreme Court has imposed greater restrictions on the government as a matter of federal constitutional law when this Court specifically refrained from imposing them in Davis, this Court should accept certiorari review to correct the state court's misinterpretation and misapplication of Davis in this case. Hass, 420 U.S. at 719.[21]

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[21] See also United States v. Dickerson, 166 F. 3d 667 (4th Cir. 1999) (cert. pet. filed July 30, 1999), wherein the Fourth Circuit Court of Appeals held that Congress had the power to, and did, enact legislation that overruled Miranda. In so holding, the court observed that it is certainly "well established that the failure to deliver Miranda warnings is not itself a constitutional violation." Id. at 690 (quoting United States v. Elie, 111 F.3d 1135, 1142 (4th Cir.1997) (citing Supreme Court cases)). Thus, by the enactment of 18 U.S.C.A. § 3501, "[n]o longer will criminals who have voluntarily confessed their crimes be released on mere technicalities" or, for that matter, an exception to bright-line rules regarding equivocal statements. Id. at 692.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court GRANT Petitioner's request for certiorari review.

Respectfully submitted,

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COUNSEL FOR PETITIONER

SUPREME COURT OF FLORIDA

MONDAY, AUGUST 30, 1999

OSVALDO ALMEIDA,	*	
	*	
Appellant/Cross-Appellee,	*	
	*	
v.	*	CASE NO. 89,432
	*	
STATE OF FLORIDA,	*	Circuit Count No. 93-20808CF10A
	*	
Appellee/Cross-Appellant.	*	
	*	(Broward)
	*	

****

Appellee-Cross-Appellant's Motion for Rehearing is hereby denied.

SHAW, ANSTEAD and PARIENTE, JJ., and KOGAN, Senior Justice, concur.

HARDING, C.J., WELLS, J. and OVERTON, Senior Justice, dissent.

A true copy

TEST:

TRIAL COURT

cc: Hon. Robert E. Lockwood, Clerk
Hon. Paul L. Backman, Judge
Mr. Gary Caldwell
Ms. Sara D. Baggett

Debbie Causseaux
Acting Clerk, Supreme Court

SUPREME COURT OF FLORIDA

No. 89,432

OSVALDO ALMEIDA,
Appellant,
Cross-Appellee,

vs.

STATE OF FLORIDA,
Appellee,
Cross-Appellant.

[July 8, 1999]

SHAW, J.

We have on appeal the judgment and sentence of the trial court imposing the death penalty on Osvaldo Almeida. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the conviction but vacate the death sentence and remand for imposition of a life sentence without possibility of parole for twenty-five years.

During the early morning hours of November 15, 1993, Osvaldo Almeida and Louis Salmon met several friends at Higgy's restaurant and ordered a pitcher of beer. When Almeida started to take a drink, the manager, Frank Ingargiola, came to the table and grabbed the glass out of his hand. Almeida was underage (he was twenty years old at the time) and had been kicked out of the restaurant before for drinking. Ingargiola told him this night to leave and not come back. Almeida was acutely embarrassed by the incident, and several hours

later he obtained a .44 caliber handgun, returned to Higgy's, and sometime after 4:30 a.m. shot Ingargiola. Almeida later told friends that he had committed the murder, and when he was arrested several days later police found the murder weapon in his car. He confessed to police.

Almeida was charged with first-degree murder, and during the guilt phase of the trial he contended that he was insane at the time of the crime. Family members and mental health experts testified concerning his extraordinarily brutal upbringing in Brazil,[1] and two

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[1] Almeida was born in Boston and was taken by his father to live in Brazil when he was five years old. The father married a sixteen or seventeen year old Brazilian and Almeida was starved, beaten, and sexually abused while in her care. Dr. Seligson, a mental health expert, testified: "My understanding is that the stepmother who was, I think she was 17 or 16 when she married Osvaldo's father, who was about almost 30 years older than her, she and her sister would take and strip Osvaldo and they would beat him. And there were times when broomsticks were broken [on him] and he would be thrown outside without food. The father would come home and beat him." Dr. Seligson continued: "[The stepmother] had, I believe, it was a cousin or brother who raped Osvaldo on at least one or two occasions, penetrated him anally when he was about 7 years old. There was also a maintenance worker who lived in the area . . . . He also sexually molested this individual. Nothing was done. And in the meantime he was being beaten and starved." Almeida's mother visited him in Brazil when he was twelve years old and was shocked by his condition. She tried to intervene: "He was very skinny, he didn't want to speak, pieces [had been cut] from his body. I got a lawyer that was in Brazil, I got a lawyer." Almeida returned to live in the United States the next year and was listless and unrecognizable to his sister: "[W]hen I first saw Ozzie, I didn't recognize him. . . . To me, it seemed like he was, he had been through the war, like it reminded me of like one of the children in the concentration camp[s]. . . . He wasn't clothed right, he was malnourished, he was skinny, he looked like a skeleton, I just couldn't understand that [it] was even him in there."

mental health experts testified that he could not distinguish right from wrong at the time of the crime.[2] In rebuttal, the State presented two experts who testified that Almeida knew right from wrong at the time of the crime.[3] Almeida was convicted as charged.

During the penalty phase, the State presented evidence of Almeida's first-degree murder convictions for killing two prostitutes in the weeks preceding the present crime.[4] In mitigation, the defense presented testimony of family members attesting to Almeida's abusive childhood and testimony of several mental health experts attesting to his unstable mental state.[5] The jury recommended death by a seven to

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[2] Dr. Strauss, a psychiatrist, testified for the defense that Almeida was insane in November 1993 and could not understand the consequences of his actions, and Dr. Seligson, a psychologist, testified that Almeida is schizophrenic and could not distinguish right from wrong.

[3] Dr. Block-Garfield, a psychologist, testified that although Almeida has mental and emotional difficulties, he could distinguish right from wrong, and Dr. Macaluso, a psychiatrist, testified that Almeida was suffering from dysthymic disorder, a chronic depressive condition, but that at the time of the crime he knew right from wrong.

[4] He shot the prostitutes because they ridiculed and insulted him when they got out of his car and haggled over money.

[5] Dr. Bukstel, a neuropsychologist, testified that Almeida has a mixed personality disorder with paranoid features, and at the time of the crime was in a serious depression and under the influence of extreme mental or emotional disturbance. Dr. Macaluso, the psychiatrist who testified for the State during the guilt phase, testified that Almeida suffered from dysthymic disorder and active alcoholism, and was under the influence of extreme mental or emotional disturbance at the time of the crime. And Dr. Strauss testified again for the defense, opining that Almeida suffered from dysthymia, posttraumatic stress disorder, mixed personality

five vote and the judge imposed a sentence of death based on two aggravating circumstances,[6] three statutory mitigating circumstances,[7] and eight nonstatutory mitigating circumstances.[8] Almeida appeals,

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problems, and alcohol- related problems. Dr. Strauss believed that at the time of the crime, Almeida was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct was substantially impaired.

[6] The court found that Almeida had previously been convicted of another capital felony and that the present crime was committed in a cold, calculated, and premeditated manner (CCP).

[7] The court found the following statutory mitigators: (1) age (Almeida was twenty years old at the time of the crime); (2) extreme emotional disturbance; and (3) impaired capacity.

[8] The court found the following nonstatutory mitigators: (1) capacity for rehabilitation; (2) good behavior while incarcerated; (3) cooperation with police after arrest; (4) confession to police; (5) alcohol abuse; (6) difficult childhood and physical abuse; (7) remorse; and (8) genuine religious beliefs.

raising fifteen issues,[9] and the State cross-appeals, raising a single issue.[10]

Almeida's first claim concerns a discussion that took place during the State's closing argument in the guilt phase. The claim focuses on three statements made by the prosecutor:

> [MR. DONNELLY (prosecutor):] [Statement No. 1.] All persons are presumed to be sane. However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the State, I must prove beyond a reasonable doubt that the defendant was sane.

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[9] Almeida claims that the court erred in addressing the following matters: (1) the State's closing argument concerning burden of proof for insanity; (2) the admission of irrelevant or prejudicial evidence; (3) the admission of improper opinion testimony; (4) photograph of the victim; (5) motion to suppress; (6) emotional reaction of victim's family; (7) CCP; (8) proportionality; (9) the evaluation of mitigating evidence; (10) the State's argument concerning mitigation and court's instruction on mitigation; (11) the State's asking the defense mitigation expert whether the defendant met the legal standard for insanity; (12) the court's giving of advice to the defendant regarding his right to address the jury; (13) the weight given to the jury's recommendation of death; (14) a presumption favoring death in the sentencing order; and (15) refusing to allow life without parole as a sentencing option.

[10] The State claims that the court erred in refusing to allow the State to introduce evidence of Almeida's two prior murder convictions during the guilt phase.

He is presumed to be sane. What evidence did you hear that led you to believe beyond a reasonable doubt that he is not sane?

MR. MOLDOF [defense counsel]: Objection, that's not the standard.

THE COURT: It's overruled. This is closings. Come on.

MR. DONNELLY: [Statement No. 2.] The testimony of Dr. Abbey Strauss and Dr. Ross Seligson was presented. If he is probably insane from what these doctors say, he is still presumed sane, still presumed sane. We're going to analyze their testimony in a couple minutes.

If evidence is presented beyond a reasonable doubt that leads you to believe that he is not sane, then that presumption vanishes.

MR. MOLDOF: That's the wrong standard. I would like to approach the bench.

THE COURT: If you want to approach the bench, fine, but I am going to instruct the jury as to the applicable and appropriate standard when I instruct them on the law. And it's the instructions that the Court gives that the jury is bound to

> follow. What the lawyers say is not evidence and it's not the law.
>
> MR. MOLDOF: I would still like to approach for a moment.

(Emphasis added.) Following the bench conference, the prosecutor then made this statement to the jury without objection:

> MR. DONNELLY: [Statement No. 3.] The Judge is going to instruct you on the law regarding insanity, this is what we anticipate that he will read to you or instruct you regarding sanity. All persons are presumed to be sane. However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the State must prove beyond a reasonable doubt that the defendant was sane.

Almeida now claims that the trial court erred in overruling his objection to the prosecutor's first statement above. We agree.

The prosecutor's initial comment was an incorrect statement of the law. See Fla. Std. Jury Instr. (Crim.) 37. The trial court thus erred in overruling the objection. We find the error harmless, however, on this record: (1) The misstatement was presented to the jury in the context of closing argument by an advocate, not in the context of an instruction by the court; (2) the misstatement was an innocent one--the prosecutor was struggling with a subtle rule of law that is difficult to articulate; (3) although the prosecutor repeated the incorrect statement to the jury (the second statement above), he minutes later read the proper instruction (the third statement above); (4) immediately following the prosecutor's second improper statement, the court announced before the jury that (a) the court would be instructing them on the law, (b) they were to follow only its instructions, and (c) what

the lawyers say is neither evidence nor law; (5) before the jury retired, the court also read the standard instruction to the jury; and (6) the jury took a copy of the standard instruction into the jury room during deliberations. We find the error harmless on this record.

To the extent that Almeida now complains that the court erred in the way it addressed this issue after defense counsel asked to approach the bench, we disagree. The record shows that following the second statement above, it was defense counsel who led the discussion at the bench and who suggested the ultimate remedy, i.e., that the prosecutor read the standard instruction to the jury ("Why don't you just read it?"). This is exactly what the prosecutor did. Defense counsel then seemed satisfied--he asked for no curative instruction or other palliative measure and filed no objection. The trial continued in a routine fashion. The trial court had no notice whatsoever that defense counsel was anything but pleased with the resolution. We find no abuse of discretion. See generally Hooper v. State, 476 So. 2d 1253 (Fla. 1985).

Almeida next claims error on several points. During the course of the trial, the following transpired: (1) The prosecutor asked Louis Salmon if he was referring in his testimony to an incident involving a knife;[11] (2) Almeida's employer testified that Almeida had told him that

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[11] On redirect examination of State witness Louis Salmon, the following transpired:

> Q. (By Mr. Donnelly) The paranoia you talked about, you said that was after this incident?
>
> A. Yeah.
>
> Q. Is that when you were threatened?
>
> A. Yeah.
>
> Q. Was that the incident with the knife you are talking about with Mr. Almeida?
>
> A. No, that was before.

he had a vision of killing and felt no remorse;[12] (3) Salmon testified that appellant had told him that Black Talon bullets make a big exit

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> Q. That was before?
> A. Yeah.
> MR. MOLDOF: Objection, a motion to make with regard to that as well.
> Q. (By Mr. Donnelly) So this is another incident afterwards where he threatened you?
> A. Yeah.

[12] The prosecutor asked State witness Mike Turner on direct if Almeida had ever discussed killing someone, and the following transpired:

> Q. Did you ever have a conversation with Mr. Almeida regarding killing someone?
> A. Yes, I did.
> Q. What did Mr. Almeida tell you with respect to killing someone?
> A. He told me he had had visions of doing that before and felt no remorse or guilt for that, that he could think about killing someone and go to bed at night and not even think twice about it.
> MR. DONNELLY: Thank you. I have no further questions, Your Honor.

wound;[13] and (4) the prosecutor asked Dr. Seligson if Almeida was a

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[13] On direct examination of Mr. Salmon, the following transpired:

> Q. Did Mr. Almeida ever have any discussion with you about the type of ammunition he uses in that gun, or that he used in that gun?
>
> A. Yeah.
>
> MR. MOLDOF: Objection to relevance and time and place.
>
> THE COURT: Could we be a little bit more specific?
>
> MR. DONNELLY: Cer ainly, Judge.
>
> Q. (By Mr. Donnelly) Did Mr. Almeida tell you the type and make of ammunition he had in the gun when he shot the manager at Higgy's?
>
> A. No, he didn't, no.
>
> Q. Did you ever have a discussion about Black Talon ammunition?
>
> MR. MOLDOFF: Objection, motion to make.

At sidebar, defense counsel argued that Salmon did not know that Black Talon cartridges were in Almeida's gun on the day of the murder. The court overruled the objection, and the following testimony took place:

> Q. Did Mr. Almeida ever tell you what effect that ammunition

gang member.[14] Almeida now claims that the court erred on these

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would have?

A. Yeah.

Q. What did he tell you?

A. He tell me, you know, it makes a small hole when it enters the body, makes a big hole when it comes out, you know.

[14] On cross-examination of defense witness Dr. Seligson, the following transpired:

Q. And the delusions [Almeida experienced] were what?

A. Paranoid delusions that people were out to get him, that people were going to harm him.

Q. That people were out to get him. What information do you possess in the documents that you reviewed that people were out to get him that led you to think that he was suffering delusions?

A. When I looked at the coworkers' they talked about him always being on guard with people, that he would overreact when people might say something to him as if they were going to attack him.

I also talked with him about his concerns when he was beaten as a child, all of these kinds of things contributed. He was always on guard. He did not trust people. I think there was also reference made when I spoke with one of the family members that he

points. We disagree. Our review of the record shows the following: (1) the prosecutor's question concerning the knife incident was improper but harmless (the question was brief and no details of the incident were discussed); (2) the claim concerning the employer's statement was not preserved (Almeida did not object); (3) the discussion of Black Talon ammunition was relevant to show premeditation (the bullets would make death more likely); and (4) the prosecutor's question concerning Almeida's possible gang affiliation was fair inquiry (the witness had stated that a gang had targeted Almeida and was beating him up). Accordingly, we find the issue raised in the first part of this claim to be harmless error and the remainder of this claim to be without merit.

During redirect examination of State witness Louis Salmon, the following discussion transpired:

> Q. Now, you said this was a crazy thing, an irrational act, is that what you said on cross examination?

> had also been the target of a gang that was beating him up when he was an adolescent.
>
> Q. He was in a gang though?
>
> A. I don't know if he was or not.
>
> MR. MOLDOF: Judge, I have an objection and a motion to make.
>
> Q. (By Mr. Donnelly) And so the delusions are that he was on guard, is that right, against whom?
>
> A. Mostly anyone. He was defensive. He was frightened of most anyone.

A. Yes.

Q. I think you said he was paranoid?

A. Yeah.

Q. Wasn't it your impression that Mr. Almeida knew that what he had done was wrong?

A. Yeah.

Q. In fact, in your words, he was a bad boy, so it's time for him to pay his dues?

MR. MOLDOF: I am going to object to that opinion.

THE COURT: It's overruled.

Q. (By Mr. Donnelly) In fact, it was your impression from him that he had been a bad boy, so it's time for him to pay his dues?

A. Yeah.

MR. MOLDOF: Objection, with regard to what Mr. Salmon thought.

THE COURT: It's overruled.

MR. MOLDOF: Motion to make.

Q. (By Mr. Donnelly) Is that not correct, Mr. Salmon?

A. Yeah.

Q. It was also your impression that he was prepared to face the consequences?

A. Yeah.

MR. MOLDOF: Same objection.

THE COURT: It's overruled.

THE WITNESS: Yeah.

MR. DONNELLY: Thank you, I have no further questions.

Almeida now claims that the court erred in overruling the defense objections. We disagree.

The above testimony related Salmon's opinion on three points: (1) Almeida knew that what he had done was wrong; (2) Almeida believed he had been a bad boy and it was time for him to pay his dues; and (3) Almeida was prepared to face the consequences. Generally, testimony is admissible on redirect that tends to clarify cross-examination testimony. See Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986). The present record shows that the above testimony was elicited following cross-examination by defense counsel that called for Salmon's opinion on virtually identical matters.[15] Thus, the above

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[15] For instance, defense counsel asked the following questions on cross-examination: "And that's because you were looking out for Ozzie, because he acted like a kid, correct?"; "You treated him like

discussion was a fair response to Salmon's testimony on cross-examination.[16] We find no error.

The State introduced as Exhibit No. 10 an autopsy photo of the victim that depicted the gutted body cavity. Almeida claims that this was error. We agree. Although this Court has stated that "[t]he test for admissibility of photographic evidence is relevancy rather than necessity," Pope v. State, 679 So. 2d 710, 713 (Fla. 1996), this standard by no means constitutes a carte blanche for the admission of gruesome photos. To be relevant, a photo of a deceased victim must be probative of an issue that is in dispute.[17] In the present case, the medical

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a kid because he was big and he seemed like he didn't understand the consequences of what was going on, correct?"; "You thought Mr. Almeida acted pretty crazy on November 14th or 15th, that night when [he] told you what he did, didn't you?"; "You thought he acted irrationally doing what he did?"; "Was it your impression that Mr. Almeida was becoming paranoid, isn't that the term you used?"; "And now, Mr. Salmon, with respect to Mr. Almeida's behavior, especially the behavior that you were observing that night on November 14th, 1993, can you tell the ladies and gentlemen of the jury if you thought that behavior was just an act, if you will, or just an attempt to, you know, look a certain way?"

[16] See also Strausser v. State, 682 So. 2d 539 (Fla. 1996) ("[I]t is a well established principle of law in this state that an otherwise qualified witness who is not a medical expert can testify about a person's mental condition, provided the testimony is based on personal knowledge or observation." Id. at 541 (quoting Rivers v. State, 458 So. 2d 762, 765 (Fla. 1984)).

[17] See McCormick on Evidence 773 (John William Strong, ed., 4th ed. 1992) ("There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." (Footnote omitted)).

examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. Neither of these points, however, was in dispute. Admission of the inflammatory photo thus was gratuitous. We find the error harmless, however, in light of the minor role the photo played in the State's case. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Almeida was picked up by police November 29, 1993, and taken to headquarters where he was read his rights, signed a waiver form, and then confessed to the murder of Frank Ingargiola. Detective Mink later sought to begin a formal recorded interrogation session and the following taped discussion transpired:

> Q. Do you mind if we call you Ozzie during this, or do you prefer your own name?
>
> A. That is okay.
>
> Q. Ozzie's okay?
>
> A. Okay.
>
> Q. Can you read and write the English language?
>
> A. Can I read English?
>
> Q. Can you read and write the English language?
>
> A. Yes.
>
> Q. Did you graduate high school?
>
> A. No, not yet. I was still finishing.

Q. All right. Prior to us going on this tape here, I read your Miranda rights to you, that is the form that I have here in front of you, is that correct? Did you understand all of these rights that I read to you?

A. Yes.

Q. Do you wish to speak to me now without an attorney present?

A. Well, what good is an attorney going to do?

Q. Okay, well you already spoke to me and you want to speak to me again on tape?

Q. (By Detective Allard) We are, we are just going to talk to you as we talked to you before, that is all.

A. Oh, sure.

Q. (By Detective Mink) Ozzie, this is a statement taken in reference to an incident that occurred at in front of Higgy's on November 15th, 1993, in the morning hours. Where the night manager by the name of Frank Ingargiola was shot in the parking lot, directly out in front of Higgy's. In your own words can you tell me what took place on this night and your involvement in this?

> A. Yes. Me and a couple of friends went to Higgy's after work.

Almeida then confessed again to the Ingargiola murder (and to the murders of the two prostitutes, Marilyn Leath and Chiquita Counts). Almeida now claims that the court erred in failing to suppress the taped statement. The State, on the other hand, contends that this issue is controlled by State v. Owen, 696 So. 2d 715 (Fla. 1997). We disagree.

We recently addressed the admissibility of this taped statement in a companion case, Almeida v. State, No. 89,402 (Fla. July 8, 1999) ("Almeida I") (addressing Almeida's conviction for the murder of Chiquita Counts). We first determined that Almeida's utterance ("Well, what good is an attorney going to do?") referred to his right to counsel and was a bona fide question calling for an answer, and we observed that this question was fundamentally different from the statement in Owen:

> This scenario is not embraced within our holding in Owen. The type of utterance at issue in Owen was an equivocal statement which--pursuant to Davis--required no clarification and could not trump the clear waiver of rights Owen had made earlier. The type of utterance at issue here, on the other hand, was an unequivocal question that was prefatory to--and possibly determinative of--the invoking of a right and which cast doubt on the knowing and intelligent nature of the prior waiver. Detective Mink plainly asked Almeida if he wanted to proceed without a lawyer, and Almeida just as plainly asked the officer what good a lawyer would do. There was nothing equivocal about this exchange and certainly nothing

> unclear about Almeida's question--it was a simple, direct question, susceptible of but a single interpretation. Almeida very clearly was asking the officer for fundamental information concerning his right to counsel.

Almeida I, slip op. at 9. We concluded that under Traylor v. State, 596 So. 2d 957 (Fla. 1992), police must make a good-faith effort to answer a clear question concerning a suspect's rights:

> The Court in Traylor thus held that if a suspect indicates in any manner that he or she wants the help of a lawyer the interrogation must cease. This proscription necessarily embraces a scenario such as the present, for the defendant here was seeking basic information on which to make an informed decision concerning his right to counsel. No valid societal interest is served by withholding such information. Indeed, both sides can only benefit from disclosure: Disclosure ensures that any subsequent waiver will be knowing and intelligent, and it reaffirms those qualities in a prior waiver.[18] Nondisclosure, on the other hand, is doubly harmful: It exacerbates the inherently coercive atmosphere of the interrogation session, and it places in doubt the

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[18] See Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992) ("A waiver of a suspect's constitutional rights must be voluntary, knowing, and intelligent.").

> knowing and intelligent nature of any waiver--whether prior or subsequent.
>
> Accordingly, we hold that if, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give a simple and straightforward answer. To do otherwise--i.e., to give an evasive answer, or to skip over the question, or to override or "steamroll" the suspect--is to actively promote the very coercion that Traylor was intended to dispel. A suspect who has been ignored or overridden concerning a right will be reluctant to exercise that right freely. Once the officer properly answers the question, the officer may then resume the interview (provided of course that the defendant in the meantime has not invoked his or her rights). Any statement obtained in violation of this proscription violates the Florida Constitution and cannot be used by the State. See Traylor, 596 So. 2d at 966

Almeida I, slip op. at 11-12. Finally, we held that police should have answered Almeida's question:

> In the present case, we conclude that Detective Mink should have made an honest effort to answer Almeida's question concerning his right to counsel. Both Almeida and the State would have benefitted from the dissemination of basic, common

> sense information concerning this right. Instead, by ignoring the question and continuing the interrogation--i.e., by "steamrolling" the defendant--the officers did two things. First, they exacerbated the inherently coercive atmosphere of the interrogation session. (How could Almeida feel free to exercise his rights when police had just overridden his question concerning those rights?) And second, they placed in doubt the validity of the prior waiver. (How could Almeida have knowingly and intelligently waived his rights earlier if he did not know "what good . . . an attorney [is] going to do?")

Almeida I, slip op. at 12. Because we were unable to say beyond a reasonable doubt that the erroneous admission of the taped statement in Almeida I did not contribute to the verdict, we reversed Almeida's conviction for the murder of Chiquita Counts. Id. at 14.

The present case is different--the conviction here is supported by copious evidence in addition to the improperly admitted taped statement: The record shows that as well as confessing on tape, Almeida also confessed to Detective Mink prior to giving the taped statement ("he just threw his hands up and said, I fucking killed him"); Almeida also confessed to Louis Salmon, Eddie Cooper, and Sergio Hoggro, all of whom testified at trial; and the gun found in Almeida's car when he was arrested was conclusively identified as the murder weapon. We conclude on this record that there is no reasonable possibility that admission of the taped statement affected the verdict. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986) ("The question is whether there is a reasonable possibility that the error affected the verdict."). We find the error harmless.

In his next claim, Almeida notes that during the course of these proceedings, defense counsel brought three points to the court's

attention: (1) Prior to trial, a woman accompanying the victim's wife allegedly said to the defendant, "You should fry, you bastard;" (2) during the medical examiner's testimony at trial, the victim's mother allegedly began to cry; and (3) during Dr. Macaluso's testimony, someone in the audience allegedly made a sarcastic remark ("Who cares."). Almeida now claims that the court erred in failing to grant a mistrial based on these incidents. We disagree. The record shows the following: (1) The jury was not exposed to the pretrial comment; (2) although neither the prosecutor nor the judge heard the mother sobbing, the court offered to give a curative instruction;[19] and (3) although neither the judge nor the bailiff, who was sitting "right there," heard the "who cares" comment, the court instructed the bailiff to tell the spectators to refrain from making such comments. We find no error. See generally Gorby v. State, 630 So. 2d 544 (Fla. 1993).

Almeida claims that the trial court erred in finding that CCP was established. We agree. A trial court's ruling on an aggravating circumstance will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record. See Willacy v. State, 696 So. 2d 693 (Fla. 1997). Competent substantial evidence is tantamount to legally sufficient evidence, and we assess the record evidence for its sufficiency only, not its weight.[20]

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[19] The court stated: "Your motion for mistrial is denied. If you want me to give any type of instruction to the jury, I'll be more than happy to do so."

[20] This Court in Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), explained:

> The weight and the sufficiency of evidence are, in theory, two distinct concepts most often relevant at the trial court level. Sufficiency is a test of adequacy. Sufficient evidence is "such evidence, in character,

The present record shows the following: (1) Several witnesses

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> weight, or amount, as will legally justify the judicial or official action demanded." In criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. Weight, at least in theory, is a somewhat more subjective concept. The "weight of the evidence" is the "balance or preponderance of evidence." It is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.
>
> As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the [ruling] on appeal, there is substantial, competent evidence to support the [ruling]. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Id. at 1123 (citations and footnotes omitted). See also Terry v. State, 668 So. 2d 954, 964 (Fla. 1996) ("[A] defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment.").

testified that Almeida had calmed down in the hours following the incident at Higgy's and evinced no plan to commit the crime; (2) the trial court found that Almeida had a history of alcohol abuse and had been drinking on the night of the crime; (3) Almeida in his own statement to police described the killing as an impulsive act committed shortly after he had left his friends and got drunk by himself; (4) the trial court found that both mental health mitigators had been established, i.e., that Almeida was extremely disturbed at the time of the crime and that his capacity to appreciate the criminality of his conduct was substantially impaired; (5) the record is replete with testimony of witnesses attesting to Almeida's lack of impulse control due to his brutal childhood in Brazil; (6) witnesses established that Almeida was particularly unstable at the time of the crime because of his recent marital separation and pending divorce. In light of these circumstances, we conclude that the record evidence is legally insufficient to support a finding of heightened premeditation. Accordingly, the court erred in finding CCP.

Almeida next claims that his death sentence is disproportionate. We agree. The Court in State v. Dixon, 283 So. 2d 1 (Fla. 1973), held that the death penalty is reserved for only the most indefensible of crimes:

> Review of a sentence of death by this Court . . . is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes.

Id. at 8. We later explained: "Our law reserves the death penalty only for the most aggravated and least mitigated murders." Kramer v. State,

619 So. 2d 274, 278 (Fla. 1993).[21] Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders.

In the present case, as noted above, only a single aggravator (commission of a prior violent felony) applies. As a general rule, "death is not indicated in a single-aggravator case where there is substantial mitigation." Jones v. State, 705 So. 2d 1364 (Fla. 1998). Nevertheless, this Court has affirmed the death penalty in single-aggravator cases where a prior murder was involved. See, e.g., Ferrell v. State, 680 So. 2d 390 (Fla. 1996) (affirming death sentence where sole aggravator was prior second-degree murder); Duncan v. State, 619 So. 2d 279 (Fla. 1993) (affirming death sentence where sole aggravator was prior second-degree murder).[22] The present case involves two prior first-degree murders. Thus, the first prong of the above standard appears to be satisfied.

The trial court additionally found three statutory and many nonstatutory mitigators, including a brutal childhood and vast mental health mitigation. This Court has reversed the death penalty in cases where the extent of mitigation was comparable or less, even in the face of significant aggravation. See, e.g., Robertson v. State, 699 So. 2d 1343 (Fla. 1997); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). In addition to the mental health mitigation in the present case, the defendant was twenty years old at the time of the crime, and the present crime and the prior capital felonies all arose from a single brief period of marital crisis that spanned six weeks. We note that the jury vote was seven to five. On this record, we cannot conclude that the present crime is one of the least mitigated murders. In fact, the record shows just the opposite--i.e., that

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[21] See also Robertson v. State, 699 So. 2d 1343 (Fla. 1997).

[22] See also Lindsey v. State, 636 So. 2d 1327 (Fla. 1994) (affirming both death sentences in double homicide where sole aggravator to support one of the death sentences was prior second-degree murder).

this is one of the most mitigated murders the Court has reviewed. Accordingly, we find Almeida's death sentence disproportionate.[23]

Based on the foregoing, we affirm Almeida's conviction and vacate his death sentence. We remand for imposition of a life sentence without possibility of parole for twenty-five years.

It is so ordered.

ANSTEAD and PARIENTE, JJ., and KOGAN, Senior Justice, concur.

HARDING, C.J., concurs in part and dissents in part with an opinion, in which WELLS, J., and OVERTON, Senior Justice, concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

HARDING, C.J., concurring in part and dissenting in part.

I would affirm the conviction and sentence of death in this case. I disagree with the majority's opinion for several reasons. First, I disagree that the trial court erred in admitting Almeida's taped confession. Second, I believe that the record supports a finding of CCP. Finally, I do not think that the death sentence is disproportionate.

I. Almeida's confession.

I disagree with the majority's conclusion that the trial court erred in admitting Almeida's taped statement. For the reasons expressed in my dissenting opinion in Almeida v. State, No. 89,402 (Fla. July 8, 1998), I would find that Almeida's statement was admissible under Davis v. United States, 512 U.S. 452 (1994), and State v. Owen, 696 So. 2d 715 (Fla. 1997).

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[23] We find the remainder of Almeida's claims to be moot, and the cross-appeal raised by the State to be without merit.

II. CCP

I also disagree with the majority's conclusion that the cold, calculated, and premeditated aggravating factor (CCP) should be stricken. In a well-reasoned sentencing order, the trial judge set forth the basis for finding CCP in this case:

> The evidence at trial revealed that on November 14, 1993, the manager of Higgy's restaurant and bar grabbed a beer from the defendant to prevent him from drinking because he was underage. Mr. Ingargiola had previously kicked the defendant out of the restaurant for drinking alcohol and told him not to do it again. The defendant, wanting to beat up the victim, attempted to lure him outside by claiming that he had identification in his car; however, Mr. Ingargiola refused to accompany him to the parking lot. The defendant and his friend, Louis Salmon, left the restaurant, at which time Mr. Salmon tried to calm the enraged defendant. They then drove to Regas' restaurant, where they picked up two other friends. Mr. Almeida drove the three men to Mr. Salmon's house, where Mr. Salmon spent over an hour and a half attempting to calm down the very angry defendant and try to talk him out of killing Mr. Ingargiola. The defendant insisted that Mr. Salmon could not talk him out of doing this. Finally, the defendant left Mr. Salmon's house and dropped off the other two men at their respective homes. He then, in his own words, got drunk and returned to Higgy's,

where he waited in the parking lot until Mr. Ingargiola finished closing up the restaurant. As the victim walked to his car, the defendant drove by and shot him at close range with a Magnum .44 revolver loaded with Black Talon ammunition.

The very fact that the defendant returned to the restaurant and waited until 4:30 in the morning for the victim to emerge so that he could shoot him provides ample support for the finding that the homicide was committed in a cold, calculated and premeditated manner. The defendant literally was lying in wait for his victim, thereby evidencing the absence of frenzy or panic as well as supporting the calculating nature of the crime. In addition, the Court finds the "heightened premeditation" element exists from the fact that despite Mr. Salmon's best efforts to dissuade the defendant from committing the crime, Mr. Almeida insisted that he would not be talked out of killing Mr. Ingargiola.

The defendant told Dr. Macaluso, one of the examining psychiatrist, that he felt Mr. Ingargiola deserved to be shot. He also bragged to several co-workers at Regas' about committing the killing and how he and an underage co-worker could now drink beer at Higgy's. Yet in his statement to the police, the defendant claimed there

> was no reason for killing Mr. Ingargiola. None of these statements comports with a moral or legal justification for the crime, particularly when this was the third homicide the Defendant committed within a six week period. Therefore, the Court finds no claim of justification or excuse that would rebut the otherwise cold and calculating nature of this homicide. Banda v. State, 536 So. 2d 221 (Fla. 1988).
>
> Based on the foregoing, the Court finds that this aggravating factor exists beyond and to the exclusion of every reasonable doubt.

I agree with the trial judge that there was sufficient evidence to find beyond a reasonable doubt that the CCP aggravating factor exists.

In Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994), this Court outlined the necessary elements for a finding of CCP: (1) the murder was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage, (2) the defendant had a careful plan or prearranged design to commit murder before the killing, (3) the defendant exhibited heightened premeditation, and (4) the defendant had no pretense of legal or moral justification. In striking CCP, the majority opinion states:

> The present record shows the following: (1) Several witnesses testified that Almeida had calmed down in the hours following the incident at Higgy's and evinced no plan to commit the crime; (2) the trial court found that Almeida had a history of alcohol abuse and had been drinking on the night of the crime;

> (3) Almeida in his own statement to police described the killing as an impulsive act committed shortly after he had left his friends and got drunk by himself; (4) the trial court found that both mental mitigators had been established, i.e., that Almeida was extremely disturbed at the time of the crime, and that his capacity to appreciate the criminality of his conduct was substantially impaired; (5) the record is replete with testimony of witnesses attesting to Almeida's lack of impulse control due to his brutal childhood in Brazil; (6) witnesses established that Almeida was particularly unstable at the time of the crime because of his recent marital separation and pending divorce. In light of these circumstances, we conclude that the record evidence is legally insufficient to support a finding of heightened premeditation. Accordingly, the court erred in finding CCP.

I respectfully disagree. The majority's bare-boned analysis of this issue is neither pertinent to the matter of heightened premeditation nor is it supported by case law.

In Clark v. State, 609 So. 2d 513, 515 (Fla. 1992), this Court stated, "To establish the heightened premeditation necessary for a finding of [CCP], the State must demonstrate that the defendant had a careful plan or prearranged design to kill." The facts in the present case reveal that after being kicked out of the restaurant, Almeida attempted to lure the victim outside in order to confront him. When this failed, Almeida told his friends of his intent to kill the victim. Almeida later returned to the restaurant and waited until 4:30 a.m. for the victim to exit the restaurant, whereupon Almeida shot and killed the victim. All of this demonstrates that Almeida had a careful plan and prearranged

design to murder the victim. On this record, I fail to see how the majority can conclude that the facts are insufficient to support a finding of heightened premeditation.

III. Proportionality of the Death Sentence

Finally, I disagree with the majority that the death penalty is disproportionate in this case. The trial judge found that two aggravating factors were established in this case: (1) CCP and (2) the defendant was previously convicted of another capital felony (the Leath and Counts murders). The trial judge found that three statutory mitigating factors were established in this case and gave each little weight: (1) age of the defendant, (2) influence of extreme or emotional disturbance, and (3) impaired capacity to appreciate criminality of conduct and conform conduct to the requirements of the law. The trial judge found that eight nonstatutory mitigating factors were established and assigned them some, little, or very little weight.

In reaching its conclusion regarding proportionality, the majority did not consider CCP. As stated earlier, I disagree with the majority that CCP was not established in this case. Even without CCP, I still would find that the death penalty is proportionate in this case. This Court has previously upheld the death penalty in single aggravator cases. See Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996); Duncan v. State, 619 So. 2d 279, 284 (Fla. 1993). In Ferrell, this Court stated:

> In the present case, although the court found a number of mitigating circumstances established, it assigned little weight to each. The lone aggravating circumstance, on the other hand, is weighty. The prior violent felony Ferrell was convicted of committing was a second-degree murder bearing many of the earmarks of the present crime . . . .

680 So. 2d at 391. Similarly, in the present case, although the court found that a number of mitigating circumstances were established, it assigned little or very little weight to each, with the exception of the

nonstatutory mitigator of difficult childhood, which was given some weight. In contrast, the aggravator in question is very weighty, especially in light of the fact that both previous first-degree murders were committed within five weeks of the present case.

If the majority believes that the trial court abused its discretion in weighing the aggravators and mitigators, then this should be explicitly stated in the opinion. But based on this record and the trial court's findings in the sentencing order, it cannot be said that the death penalty is disproportionate.

Accordingly, I would affirm the conviction of guilt and sentence of death in this case.

WELLS, J., and OVERTON, Senior Justice, concur.

Notice of An Appeal and Cross-Appeal from the Circuit Court in and for Broward County,

Paul Backman, Judge - Case No. 93-20808CF10A

Richard L. Jorandby, Public Defender, and Gary Caldwell, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida,

for Appellant, Cross-Appellee

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